

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES ROY McNEIL,

Petitioner,

vs.

JAMES WALKER, et al.,

Respondents.

Civil No. 12-0996 AJB (BLM)

**SUMMARY DISMISSAL OF
 SUCCESSIVE PETITION PURSUANT
 TO 28 U.S.C. § 2244(b)(3)(A)
 GATEKEEPER PROVISION**

On April 18, 2012, this Court received information from California State Prison, Sacramento, and the United States District Court for the Eastern District of California regarding the discovery of mail which prisoners had submitted for mailing to prison authorities. The mail had been stamped and metered but had not been mailed to the Court. According to the information provided, the documents were dated between 2009 and 2012. Among the documents forwarded to this Court was the 28 U.S.C. § 2254 habeas corpus petition from Petitioner, James Roy McNeil, in this case which the Court has filed nunc pro tunc to the date it was signed, June 20, 2010.

Petitioner is a state prisoner proceeding pro se. He has not paid the \$5.00 filing fee and has not filed a motion to proceed in forma pauperis. The Court does not rule on Petitioner's in forma pauperis status because this case is summarily dismissed pursuant to 28 U.S.C. § 2244(b)(3)(A) as indicated below.

///

PETITION BARRED BY GATEKEEPER PROVISION

The instant Petition is not the first Petition for a Writ of Habeas Corpus Petitioner has submitted to this Court challenging his conviction in San Diego Superior Court case No. SCD 147486. On September 27, 2005, Petitioner filed in this Court a Petition for Writ of Habeas Corpus in case No. 05cv1852 J (PCL). In that petition, Petitioner challenged his conviction in San Diego Superior Court case No. SCD 147486 as well. On August 31, 2006, this Court dismissed the petition as time barred. (*See* Order filed Aug. 31, 2006 in case No. 05cv1852 J K (PCL) [Doc. No. 11].) Petitioner appealed that determination. On November 12, 2011, the Ninth Circuit Court issued an order limiting any appeal to the question whether the District Court abused its discretion in rejecting Petitioner's motion for appointment of counsel because Petitioner had not filed a notice of appeal within 30 days of the District Court's entry of judgment. (*See McNeil v. Kirkland*, No. 11-56452 (9th Cir., Nov. 14, 2011). The Ninth Circuit later affirmed this Court's denial. (*See McNeil v. Kirkland*, No. 11-56452 (9th Cir., Jan. 11, 2012). On October 19, 2009, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his San Diego Superior Court conviction in case No. SCD 147486 in this Court in case No. 09cv2339 WQH (WMc). The Court dismissed that petition as successive pursuant to 28 U.S.C. § 2244(b)(3)(A) on November 9, 2009. (*See* Order dated Nov. 9, 2009, in case No. 09cv2339 WQH (WMc).) On February 6, 2012, Petitioner filed another Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 challenging his San Diego Superior Court conviction in case No. SCD 147486 in this Court in case No. 12cv0347 WQH (WMc), which the Court also dismissed as successive pursuant to 28 U.S.C. § 2244(b)(3)(A). (*See* Order dated Feb. 14, 2012 in case No. 12cv0347 WQH (WMc).

Petitioner is now seeking to challenge the same conviction he challenged in his prior federal habeas petitions. Unless a petitioner shows he or she has obtained an Order from the appropriate court of appeals authorizing the district court to consider a successive petition, the petition may not be filed in the district court. *See* 28 U.S.C. § 2244(b)(3)(A). Here, there is no indication the Ninth Circuit Court of Appeals has granted Petitioner leave to file a successive petition.

CONCLUSION

Because there is no indication Petitioner has obtained permission from the Ninth Circuit Court of Appeals to file a successive petition, this Court cannot consider his Petition. Accordingly, the Court **DISMISSES** this action without prejudice to Petitioner filing a petition in this court if he obtains the necessary order from the Ninth Circuit Court of Appeals. ***The Clerk of Court is directed to mail Petitioner a blank Ninth Circuit Application for Leave to File a Second or Successive Petition under 28 U.S.C. § 2254 OR § 2255.***

IT IS SO ORDERED.

DATED: April 24, 2012


Hon. Anthony J. Battaglia
U.S. District Judge